

**REMARKS/ARGUMENTS**

Claims 1, 2, 4-12, 14 and 15 are pending in the application.

Claims 4, 12, 14 and 15 have been rejected under 35 U.S.C. §112, second paragraph, for being indefinite. Claim 4 has been amended to depend on claim 1 and claim 14 has been amended to depend on claim 12. With respect to the rejection of claim 12, Applicants have amended claim 12 to recite "wherein each of the base plates comprises a section that extends in a direction away from the corresponding top plate and that engages with the tubular section." Applicants believe that the amendments to claim 4, 12 and 14 overcome this rejection.

Claims 1, 2, and 5 have been rejected under 35 U.S.C. 102(b) over Buttermann, (US 5,827,328). Claim 1 has been amended to recite "a tubular section defined by an outer wall and having a longitudinal axis." Claim 1 has been further amended to recite "a plurality of openings in the outer wall of the tubular section." In contrast, Buttermann does not teach or suggest the noted limitations of claim 1.

Referring to Figs. 1 and 4 of Buttermann, a first fixation member 14 is positioned in a first vertebral body 20, and a second fixation member 16 is positioned within a second vertebral body 22 adjacent the first vertebral body 20. Each fixation member has an adjustable member 28 and a support member 32. The adjustable member 28 is adjustable in an axial direction by adjustment elements 24. The adjustment elements 24 have telescopic struts extending between a first plate 31 and a second plate 33. However, Buttermann does not show a tubular section defined by an outer wall with a plurality of openings in the outer wall between the first plate 31 and the second plate 33. The adjustment elements 24 are arranged in a spaced apart configuration between the first plate 31 and the second plate without any tubular section defined by an outerwall having a plurality of openings between the first plate 31 and the second plate 33.

Because Buttermann does not teach or suggest a tubular section defined by an outer wall and having a longitudinal axis and a plurality of openings in the outer wall of the tubular section, claims 1, 2, and 5 are patentable over Buttermann.

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Claims 1, 2, 5, 12 and 15 have been rejected under 35 U.S.C. 102(b) over Rabbe, et al., (US 5,776,198). Applicants have amended claim 1 to recite "a top plate connected with the base plate, the top plate configured and positioned to engage a vertebral body end face facing an end face of an adjacent vertebral body." Applicants have also amended claim 12 to recite a first element and a second element, each having "a base plate connected with the first end of the tubular section, a top plate connected with the base plate, the top plate configured and positioned to engage a vertebral body end face facing an end face of an adjacent vertebral body." In contrast, Rabbe, et al., does not teach or suggest the noted limitations of claim 1 and 12.

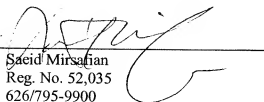
As shown in FIGS. 7 and 8 of Rabbe, et al., the endplates 83 are connected to rods 105. The endplates 83 are engaged in the corresponding vertebrae with spikes 91. Distraction plates 107 are mounted into each of the respective intact vertebrae by way of bone screw 108. The distraction plates 107 are connected to the body 21 by the distraction rod 105. Referring to Fig. 9 of Rabbe, et al., each distraction plate 107 is attached to the side of the corresponding vertebral body. Accordingly, each distraction plate 107 is not configured and positioned to engage an end face of a vertebral body as recited in claims 1 and 12. Therefore, Applicants believe that claims 1 and 12 are patentable over Rabbe, et al.

Claims 4 and 14 have been rejected under 35 U.S.C. 103(a) over Rabbe, et al. Because claims 1 and 12 are patentable over Rabbe, et al., Applicants believe that claims 4 and 14 are also patentable over Rabbe, et al.

Based on the foregoing, Applicants believe that the claims are now in condition for allowance.

Respectfully submitted,  
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